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Negligence--Res Ipsa Loquitor--Possible Relaxation of the Requirement of Exclusive Control in Bottled-Beverage Cases

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other jurisdictions, see, e.g., *Virginian Ry. v. Viars*, 193 F.2d 547 (4th Cir. 1952); *Scott v. Simms*, 188 Va. 808, 51 S.E.2d 250 (1949); and *Frazier v. Cities Service Oil Co.*, 159 Kan. 655, 157 P.2d 822 (1945). It is submitted that an application of the rule in the principal case, if negligence actually existed, could have reversed its outcome. It seems feasible that the driver of a truck who knows of the presence of a rock between the dual wheels could reasonably foresee an injury of some kind if the rock is thrown. Through use of the majority rule, the fact that the injury occurred in an unusual manner or to an unexpected victim would not absolve the defendant of his negligence.

A modernization or restatement of the rule of foreseeability and a definite showing of the presence or absence of negligence would aid in an interpretation of the principal case.

J. S. T.

NEGLIGENCE—RES IPSA LOQUITUR—POSSIBLE RELAXATION OF THE REQUIREMENT OF EXCLUSIVE CONTROL IN BOTTLED-BEVERAGE CASES.—*D*, a bottling company, made delivery of six cases of coca-cola to *P*'s employer, *X* company. Two of these cases were placed in a hallway next to a soft-drink vending machine; the other four were locked in a closet until needed. *Y*, another employee of *X* company, was in charge of stocking the vending machine. *P* got a bottle from the machine; immediately uncapped it and drank therefrom. Relying on *res ipsa loquitur*, she brought an action for personal injuries sustained from glass particles allegedly contained in the bottled beverage. Held, "... [U]nder the rule of *res ipsa loquitur*, it is reversible error to instruct the jury to the effect that they should find for the plaintiff unless they believe that the defendant has overcome by competent evidence, the inference of negligence." *Rutherford v. Huntington Coca-Cola Bottling Co.*, 97 S.E.2d 803 (W. Va. 1957).

Our court is here considering the extent of a procedural advantage that a showing of *res ipsa loquitur* will confer upon a plaintiff. The various jurisdictions are by no means unanimous upon this point. See PROSSER, TORTS § 43 (2d ed. 1955); 20 MINN. L. REV. 241 (1936). A very few have held that such a showing shifts to the defendant the burden of proof. *Coca Cola Bottling Co. v. Mat-tice*, 219 Ark. 428, 243 S.W.2d 15 (1951); *Jones v. Shell Petroleum Corp.*, 185 La. 1067, 171 So. 447 (1936). A somewhat larger group

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has held that a rebuttable presumption of the defendant's negligence arises requiring a directed verdict for the plaintiff if the defendant offers no evidence to overcome it. *Schechter v. Hann*, 305 Ky. 794, 205 S.W.2d 690 (1947); *Cleveland, C., C. & St. L. Ry. v. Hadley*, 107 Ind. 204, 84 N.E. 13 (1907). Finally, the majority of the courts regards *res ipsa loquitur* as creating only a permissive inference of negligence which will merely get the case to the jury, supporting but not requiring a verdict for the plaintiff. *Levine v. Union & New Haven Trust Co.*, 17 Conn. 435, 17 A.2d 500 (1941); Annot., 52 A.L.R.2d 108 (1957).

Until *Holley v. Purity Baking Co.*, 128 W. Va. 531, 37 S.E.2d 729 (1946), our court apparently maintained the second mentioned position: that where *res ipsa loquitur* was applicable, a prima facie presumption of negligence arose. *Blevins v. Raleigh Coca-Cola Bottling Works*, 121 W. Va. 427, 3 S.E.2d 627 (1939). But in the *Holley* case, the court reappraised their earlier decisions and shifted to the position, deprecated on the grounds of stare decisis by Judge Kenna in his concurring opinion, that only a bare inference and not a presumption is created. The instant case is a reaffirmation of that last position, with Judge Browning reiterating, at page 809, that "... establishing an inference of negligence by the evidentiary rule of *res ipsa loquitur* may be sufficient for the jury to find a verdict for the plaintiff, but it is never required to do so, and a directed verdict for the defendant is not warranted, even though the latter, at the peril of an adverse verdict, offers no testimony".

Although not in direct answer to any assignment of error, the larger part of the majority opinion, and the entirety of the dissent, were concerned with whether or not the traditional requirement of "exclusive control", as an essential element in establishing *res ipsa loquitur*, was satisfied by the particular facts of this case; and if it was not, what is the status of "exclusive control" in bottling cases in West Virginia. See *Keffer v. Logan Coca-Cola Bottling Works*, 93 S.E.2d 225 (W. Va. 1956); *Cunningham v. Parkersburg Coca-Cola Bottling Co.*, 137 W. Va. 827, 74 S.E.2d 409 (1953). To even presume to undertake an extensive examination of the court's analysis of precedent and distinguishable cases is beyond the scope of this comment. What shall be attempted, will be only to suggest certain implications of the decision, surmising as to a possible easing of the requirement of "exclusive control" in applying *res ipsa loquitur* to bottling cases.

The classical requirements for the application of the doctrine are three: (1) the instrumentality causing the injury must be of a type as not to cause injury in the course or ordinary use unless it was carelessly constructed, inspected, or used; (2) the defendant must have control of the instrumentality at the time of the injury; and (3) the plaintiff must not have contributed to his own injury. *Wright v. Valen*, 130 W. Va. 466, 43 S.E. 2d 364, 368 (1947); 9 WIGMORE, EVIDENCE § 250 (3d ed. 1940). The purposes of the first two limitations are, respectively: to require the showing of circumstances such as to give rise to an "inference" that someone is negligent; and, second, to show the defendant's control of the situation so that the negligence will be brought home to him. 20 MINN. L. REV. 241, 242 (1936).

It is difficult to dispute the dissent's contention that this is a situation ". . . where exclusive control has clearly and definitely passed from the defendant and where there is not the least doubt that persons not responsible to defendant had 'opportunity' to have committed the act which resulted in the injury". At page 811.

Just how far might the court extend this application of *res ipsa loquitor*? Could it be utilized, for instance, by a plaintiff who, after purchasing the goods from a retailer, takes them to his home, perhaps even lays them away for a considerable time, and later sues the manufacturer or distributor for damages allegedly sustained in partaking therefrom? Although we must look to further decisions by the court as to the line of demarcation, the majority opinion seems to imply that they will permit *res ipsa loquitor* to be applied whenever the facts shown indicate the negligence of the defendant and reasonably exclude any other hypothesis, "exclusive control" notwithstanding. See Annot., 52 A.L.R. 2d 108 (1957) which discussed *Blevins v. Raleigh Coca-Cola Bottling Works*, *supra*, and *Parr v. Coca-Cola Bottling Works*, 121 W. Va. 314, 3 S.E.2d 499 (1939), cases the court "approved and followed" in the instant case, and maintained that West Virginia's position in this matter is that a submissible case on the question of the negligence of a bottler or manufacturer is made out by proof of the actual presence of a foreign substance in the beverage at the time of the purchase.

At first blush, if the court is, indeed, so relaxing this limitation of exclusive control, it seems that a new field of tort liability on the part of manufacturers and distributors has been made accessible to ultimate consumers of injurious commodities. Did a showing of *res*

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ispa loquitur "prove" liability, or shift the burden of proof, or raise a rebuttable presumption of negligence, that might well be the case. But if we recall that in West Virginia only a naked inference of negligence is created, then we realize that liability is far from being proved. Even under the implied "extension" of the exclusive control doctrine, essentially, the court would be saying only that in such cases, where evidence is admittedly scarce, there has been a sufficient showing of circumstantial evidence so as to reasonably eliminate all other sources of harm, save the negligence of the defendant; and that, therefore, the case is submissible to the jury, who, in their deliberations, may yet rightfully find for the defendant though he tender no evidence at all. Thus, the less potent is *res ipsa loquitur* in the artillery of the plaintiff's proof, the more the court might justly force the defendant to submit himself to legal combat.

Finally, it might be argued that if the court does desire to be more liberal in allowing such recovery by consumers, rather than to so fly in the face of precedent, it would be better to employ some other legal device than *res ipsa loquitur*. Perhaps, recovery might be allowed on the theory of a breach of an implied warranty. See the West Virginia case of *Kyle v. Swift & Co.*, 229 F. 2d 887, 889 (4th Cir. 1956). Or, perhaps, the court, alive to the modern tendency to soft-peddle negligence where the risk can be placed on an industry or society as a whole, will follow the lead of such cases as *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 453, 150 P. 2d 436, 440 (1944) (concurring opinion), in which Judge Traynor boldly stated that, "... in my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. . . . Even if there is no negligence, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. . . . If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly."

Of course, these last mentioned approaches are but winds of doctrine, and it would be presumptive either to prophesy that our court will follow one of them, or to exhort them to do so. We must look respectfully to the court for further pronouncements and eluci-

dation on what seemingly is an extension of the conditions whereby *res ipsa loquitur* is applicable in bottled beverage cases.

J. E. D., Jr.

WILLS—CONSTRUCTION OF AMBIGUOUS RESIDUARY CLAUSE—FEE SIMPLE OR LIFE ESTATE.—Testator, in the residuary clause of his will ambiguously devised the remainder of his property to his wife absolutely in fee simple, and after her death the residue was to be equally divided among his three daughters. The state tax commissioner contends the clause gave the testator's wife an estate in fee simple and thus made the property subject to the state inheritance tax as a part of the wife's estate. *Held*, affirming the circuit court, that the language construed in conjunction with the entire will and in light of the circumstances surrounding the testator when he made the will gave the wife a life estate with a remainder to the daughters. *Weiss v. Soto*, 96 S.E.2d 727 (W. Va. 1957).

The problem raised by the ambiguous devise of a gift over after a fee simple is open to controversy. A number of the courts resolve the ambiguity through the ancient rule of property that a gift over after a devise in fee simple is void as repugnant to the first gift. *In re Lewis Estate*, 80 N.W.2d 347 (Iowa 1957); *Bardfield v. Bardfield*, 23 N.J. Super. 248, 92 A.2d 854 (1952); *Clarkson v. Bliley*, 185 Va. 82, 38 S.E.2d 22 (1946). A more recent view, adopted by the principal case, is that the testator's intention, as determined from the will as a whole and the circumstances surrounding the testator when he made the will, prevails over conflicting rules of law. *Hanks v. McDanell*, 307 Ky. 243, 210 S.W.2d 784 (1948); *Dyal v. Brunt*, 155 Kan. 141, 123 P.2d 307 (1942).

These two currents of thought are in agreement that the cardinal rule in the construction of wills is the ascertainment of the testator's intention, but the older view refuses to uphold it where it conflicts with their basic premise. *Perdue v. Morris*, 93 Ohio App. 538, 114 N.E.2d 286 (1952). The strength of the adherents to the more recent view lies in the assertion that the testator may not have intended to create a fee simple in the first place, and if so found, then there is no need for the application of the repugnancy doctrine. *In re Hanna's Estate*, 344 Pa. 548, 26 A.2d 311 (1942).

A third view maintains that an unequivocal gift in fee simple cannot be reduced by a subsequent clause, unless the provisions are equally as clear and decisive as the words of donation. *Platz v.*